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## SELF-RULE IN THE CITIES

*By James Schouler, LL.D.*

Local self-government in each town or civic community has long been cherished by American people as a precious political right; and yet, seemingly, without duly considering how far in reality our written fundamental law in the several states asserts or upholds such a doctrine. Blackstone and old traditions of the mother country are invoked in support of that principle. Yet British institutional government is very different from our own; and under the ancient charters and franchises of English cities and boroughs—often by way of grant from the crown as some mark of special favor—self-rule in matters local has long comprised, for the voters, about the whole of self-rule in affairs of the realm, except for the choice of some representative, often a non-resident, to the House of Commons. In this country, on the other hand, a written constitution defines and separates the primary functions of government for each state jurisdiction apart. Such instruments, as we find, proclaim that government originates of right in the people, that rulers are their servants, and that elections shall be free; but all this is meant not, presumably, for subdivided sovereignties, but for sovereignty in the people of the whole state collectively.

In the earlier days of our Union, when people lived in towns of moderate size and a homogeneous population, when they seldom travelled far, but remained at home for the most part and carried on personal pursuits, local public concerns were controlled by the whole body of local electors and the best and ablest among fellow-citizens were usually proud of being chosen to conduct them. Wealth was distributed and so were numbers. The New England town system, with its three selectmen and an annual meeting of the people, furnished the instance of a perfect democracy. When, however, about eighty years ago, railroad travel and manufactures introduced new conditions of life, and people began to swarm, as they have done ever since, into chosen centres of industry, with incongruous elements, losing the old equilibrium of wealth and numbers, municipal charters were called for; and the earliest impulse of our legislators was to create miniature sovereignties, as bodies politic, after the pattern of the state, sepa-

rating the functions of rule and superseding the town meeting by a sort of representative assembly of the community in a territorial subdivision. Hence, our American "council," so-called, combining usually mayor, aldermen, and a "common council," representing wards, to administer what in private corporations we see efficiently managed by a president and small board of directors, chosen by the whole body of stockholders and deriving authority from them in essential matters.

How civic government in America has gradually become complex and difficult under a representative system, as cities themselves have grown unwieldy in finance and population, I need not recite. It is a source of high encouragement at the present day that leading citizens, in all parts of the country, are giving close attention to the problems of municipal reform, and contriving charter changes in the interest of a just and honest local administration. One set of civic experiments, with which we have long been familiar, consists in creating metropolitan boards under state control, for managing police, school or other special concerns, which involve a local responsibility. The other and more recent set is based upon simplifying civic government altogether, after plans, which, beginning with the Galveston charter in Texas, have spread rapidly to other sections of the Union, including some of our oldest states.

Wherever experiments of the one kind or the other have gained a footing in public opinion, the legislature has passed the enactment thought needful and the judiciary inclines to support rather than resist or interfere. Old theories of municipal self-rule fail in consequence. To the claim of an inherent right of self-rule in each civic community answer is made that no written statement sanctioning such a right can be found in the constitution; and that, failing such express sanction, the legislature remains free to exercise its authority—to grant, change or repeal civic charters in its own plenary discretion. Nor can "taxation without representation" be asserted as a local grievance under such conditions, when the city itself is duly represented in the sovereign body which enacts how that city shall be governed.

A brief reference to some of our state decisions may indicate how greatly judicial opinion has changed within half a century respecting the so-called inherent right of civic self-government.

Vicious tendencies of municipal rule in our largest metropolis led the New York legislature, in 1857, to pass a bill which pro-

vided for New York City, in place of its local police board locally elected, a metropolitan commission for both New York and Brooklyn, consisting of five persons appointed by the governor, with the mayors of the two cities added. In *People v. Draper*,<sup>1</sup> it was held, against the opposition of New York's mayor on behalf of the inhabitants, that this act was constitutional and valid. "Plenary power in the legislature for all purposes of civil government is the rule" was the language of the court. But later, in 1873, when "the inherent right of the people" of a city to govern themselves had gained much headway as a political dogma the same court criticised the former case and pronounced a new enactment void which established a metropolitan police board for Troy and its neighboring territory.<sup>2</sup> "The right of self-government," said Allen J., voicing the opinion of the bench, "lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation."

This later dictum of the New York Court of Appeals was cited with approval by Judge Cooley, of Michigan, when denying emphatically the right of a state legislature to deprive municipal voters of the right to choose their own local officers, or to disregard in local concerns the city's council. Under the inspiration of that able jurist, who won a national fame during his life in matters of constitutional law, the Michigan courts were zealous to sustain home rule in, at least, two cases of this period which involved such an issue for the city of Detroit. Acts of the Michigan legislature were declared void which set up boards of local public works or local highways under state control and appointment, in disregard of the local citizens. "Permanent appointments for purely municipal purposes," it was announced, "can only be made by municipal authority."<sup>3</sup>

But Michigan, as well as New York, had been earlier committed to the concession of state authority where only a police board was concerned, and hence the court made effort to distinguish a state supremacy for exercising simply the police power. The preservation of the peace, as Campbell, C. J., here pointed out, is

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<sup>1</sup> 15 N. Y., 532 (1857).

<sup>2</sup> *People v. Albertson*, 55 N. Y., 50.

<sup>3</sup> *People v. Hurlburt*, 24 Mich., 44 (1871); *People v. Detroit*, 28 Mich., 228; 29 Mich., 108 (1874).

a sovereign prerogative of the highest importance; and crimes and disorders are punished, as a violation, not of the peace of a city or county alone, but of the peace of the whole commonwealth.

In Indiana, the influence of the Michigan decisions was strongly felt, and in *State v. Denny*,<sup>4</sup> in 1889, the court pronounced void an act of that date, which created a metropolitan police and fire board combined, for certain cities of the state, and provided the election of the first incumbents by the legislature. This decision was directed mainly against the proposed fire department as being inseparable from the other features of the act; but the opinion, as delivered, based the court's objections quite broadly upon "fundamental principles of government," the spirit of the constitution, and those "inherent and inalienable rights of local self-government" which vested in the people of each municipality.

But during the many years which have elapsed since the foregoing cases were decided a notable change of judicial sentiment has developed in this country in favor of legislative control, supervision, and supremacy, at discretion, in all municipal matters. Those "inherent and inalienable" rights of the citizens of towns and cities, as such, prove of nebulous existence, in view of the actual written expression of our several constitutions. In *Arnett v. State*,<sup>5</sup> the Indiana court, in 1906, upheld a new act of the legislature, which sought the creation of metropolitan police boards only. While professing to distinguish its two decisions, the court now abstained wholly from re-asserting the principle of local self-rule. It admitted that metropolitan police systems were now so well established in the United States, as against all constitutional objection, that the question was at rest. For maintenance of peace and quiet and the suppression of crime were matters of general interest; and whether they could best be obtained by means of a centralized or a local government was wholly for the legislature to determine. The fact that each city itself had to bear the expense of a local police force controlled by the state was held immaterial.

Legislative supremacy over municipal corporations, in the new and broader sense of creating in fact a civic government by commission, was fully considered and sustained as a principle in the famous *Galveston Case* of 1903.<sup>6</sup> The court here set authentic

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<sup>4</sup> 118 Ind., 449.

<sup>5</sup> 168 Ind., 180.

<sup>6</sup> 97 Texas, 1.

state history against traditions and refused to deduce a right of local self-rule in chartered cities from asserted claims of natural justice or a "supposed spirit of the constitution." Here the Texas act of 1901 had transferred all the property of the city of Galveston to a board of five commissioners, three of whom were to be appointed by the governor and only two by the qualified voters of the city; and this board was invested with full power to levy and collect local taxes and carry on the local civic government. The court declared itself confined to the written constitution of the state, as the standard whereby the validity of any act of the legislature should be determined, and sustained accordingly the enactment.

In Georgia, during the previous year, the highest state court had taken a similar position in upholding a rightful control of civic government by the legislature, as against any such interpretation of a state constitution as might extend rights asserted of the people at large to people considered merely as a local and fractional community; or so that government "originating as of right in the people" should mean that municipal government rightfully originates in municipal inhabitants, regardless of the state. Here, however, the decision itself related only to the statute establishment of local police boards whose earliest members were designated by name with a self-perpetuation for the future.<sup>7</sup>

Since these cases were decided, the drift of judicial opinion in all our state courts has clearly been to confirm the sovereignty of the state, embodied in its legislature, in all municipal establishments. And the Supreme Court of the United States lends its influence to such a doctrine.<sup>8</sup> In the Des Moines' act of Iowa and wherever else civic government is simplified the new experiments have been allowed their course. Hence, the solicitude of Michigan courts, in a former era, for the representative "council" of a city as a *quasi*-legislative body whose authority to participate in local concerns the state itself might not set at naught, finds little or no countenance in other jurisdictions at this later day. A legislature does not relinquish its own authority to define and punish crimes and misdemeanors for a city.<sup>9</sup> A legislature may provide for the removal of high municipal officers by the gov-

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<sup>7</sup> *Americus v. Perry*, 114 Ga., 180 (1902).

<sup>8</sup> *Atkins v. Kansas*, 191 U. S., 207 (1903).

<sup>9</sup> *Keefe v. People*, 37 Col., 317 (1906).

ernor.<sup>10</sup> A legislature may provide for the creation and manner of filling any and all municipal offices.<sup>11</sup> The legislature has discretion to pass "local option" laws, or to give a civil service commission in the state a right to participate in awards of the city patronage.<sup>12</sup> Annual state elections under a state constitution do not debar the legislature from making municipal elections biennial.<sup>13</sup> Metropolitan boards are created by a legislature, for park and other civic purposes, and changed or abolished at discretion. Provisions for initiative, referendum and recall may be inserted in a municipal charter.<sup>14</sup> And, not only do the latest reported cases, so far as I can discover, emphatically sustain a plenary exercise of authority in the legislature wherever municipal matters are provided for, but they more or less directly support the establishment of commission governments for our cities, whether with or without seeking the suffrage of the local electors. Should any state constitution expressly restrain the legislature in such matters or confer distinctly upon citizens of a local community the right of local self-rule, it would be otherwise; but public opinion just now tends quite to the contrary direction in municipal experiments.

In short, our fundamental law in America does not guarantee to the people of political divisions in a state any implied right of local self-government to assert against the state itself. "We have held," observes the court in one of our latest cases, "in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion."<sup>15</sup> And, upon this fundamental principle judges now rest, even when doubting, as they sometimes do, whether some of the experimental changes lately put in operation are likely to give to the local inhabitants a beneficent and well-ordered government..<sup>16</sup>

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<sup>10</sup> *People v. Ahern*, 196 N. Y., 221 (1909).

<sup>11</sup> *People v. Earl*, 42 Col., 238 (1908).

<sup>12</sup> *Booth v. McGuinness*, 75 Atl., 455 (1910). But here the act was held unconstitutional because it was made to take effect in such cities as might locally vote to adopt it. Cf. *People v. McBride*, 234 Ill., 146; *Dunn v. Wilcox County*, 4 So., 661-663 (1888).

<sup>13</sup> *People v. Schen*, 167 N. Y., 292.

<sup>14</sup> *Graham v. Roberts*, 200 Mass., 152 (1908).

<sup>15</sup> *Lutterlow v. Fayetteville*, 149 N. C., 65 (1908-09).

<sup>16</sup> See *per curiam*, *Graham v. Roberts*, 200 Mass., 152.

We seek to return, if we may, to the plain democracy of the old town meeting of local electors, but with new expedients for popular expression in place of the "representative council" plan, where civic communities are found too numerous for assembling all the voters at one place to take public action. If petitions and nomination papers, signed by individuals, come well into vogue, perhaps the proxy principle for special measures might be introduced with good effect.

*James Schouler.*